

S E R V E D

February 5, 2014

FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**DOCKET NO. 11-12**

**KAWASAKI KISEN KAISHA, LTD.;  
NIPPON YUSEN KAISHA; UNITED ARAB SHIPPING COMPANY (S.A.G.);  
and YANG MING MARINE TRANSPORT CORPORATION**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

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**ORDER DENYING COMPLAINANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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**I.**

On January 11, 2012, a motion seeking partial summary decision and a statement of facts were filed by Complainants COSCO Container Lines Company Limited; Evergreen Line a Joint Service Agreement; Hanjin Shipping Co., Ltd.; Horizon Lines, LLC; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation. A number of the Complainants have subsequently withdrawn from the proceeding.

On January 26, 2012, a reply in opposition to the motion for judgment and a response to the statement of facts were filed by Respondent, The Port Authority of New York and New Jersey ("Port Authority").

For the reasons set forth below, the motion seeking partial summary decision is **DENIED**.

**II.**

Complainants move for partial summary decision, arguing that the Respondent's container facility charge on empty containers violates section 41102(c) of the Shipping Act. Motion at 1. Complainants contend that the Port Authority's blockade-enforced collection of the cargo facility charge on empties violates its tariff and the Shipping Act and should be stopped now and that legal precedent dictates that Complainants are entitled to partial summary judgment. Motion at 1-20.

Respondent asserts that the cargo facility charge, by its express language, clearly applies to empty containers; charging the cargo facility charge on all containers is consistent with the purpose of the cargo facility charge; and Complainants are not entitled to summary judgment under any circumstances. Opposition at 1-11. Complainants also contend that the motion asserts new allegations that were not asserted in the Complaint. Opposition at 4-5.

### III.

#### A. Motion for Summary Decision Standard

The Commission has emphasized that

At the summary judgment stage, the role of the judge “. . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 249 (1986)]. The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); [10A ]Wright, Miller & Kane, [*Federal Practice and Procedure* § 2727, p. 455 (3d ed. 1998)].

*EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (FMC 2008).*

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-48. However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *Taylor v. Rederi A/S Volo*, 374 F.2d 545, 549 (3d Cir. 1967); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984). See also Fed. R. Civ. P. 56 advisory committee notes, 2007 amendments (“there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact”).

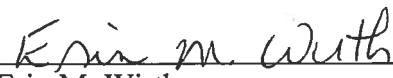
## B. Discussion

The parties dispute whether the cargo facility charge should apply to empty containers. Complainants assert that the cargo facility charge's express language does not apply to empty containers and point to various definitions of cargo. Motion at 10-14. Respondent alleges that the cargo facility charge expressly applies to all cargo containers, pointing to the language in the first subrule of the tariff, which states: "This fee shall apply to all cargo containers, ..." Opposition at 1-4. Moreover, according to the Respondent, it has long been the operating practice in the Port that empty containers are subject to infrastructure investment recoupment fees and that the previous rail fee was similarly assessed on all cargo containers. Opposition at 3. Respondent contends that, at most, there is a dispute as to the material facts. Opposition at 4.

Complainants request that the imposition of the cargo facility charge on empty containers be found to violate the Shipping Act as a matter of law. However, the parties dispute whether the express language of the tariff applies to empty containers. Viewing the evidence in the light most favorable to the non-moving party, Complainants have not established a violation of the Shipping Act as a matter of law. Moreover, there is a question of whether this issue was properly raised in the Complaint. Accordingly, the motion seeking partial summary decision is denied. The parties may address this issue during the briefing on the merits.

## IV.

For the above-stated reasons, it is hereby **ORDERED** that the motion for partial summary decision filed by Complainants be **DENIED**.

  
Erin M. Wirth  
Administrative Law Judge